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March 11, 1997

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1997

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115; Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162

Dear Mr. Caton:

On January 15, 1997, Paul Eskildsen, Steve Inkellis, Len Sawicki and I, representing MCI Telecommunications Corporation (MCI), met with Dorothy T. Attwood, William A. Kehoe III and Gayle Radley Teicher of the Common Carrier Bureau and Jane Hinkley Halprin of the Wireless Bureau to discuss MCI's positions in the above-captioned proceedings. During that meeting, the Commission staff attendees requested MCI to provide copies of MCI filings in various proceedings. Attached are copies of the following requested filings:

Notice and Plaintiffs' Application for Preliminary Injunction; Memorandum of Points and Authorities in Support, filed by AT&T Communications of California, et al., AT&T Communications of California, Inc., et al. v. Pacific Bell, et al., No. C96-1691-SBA (N.D. Cal. filed June 4, 1996);

Joint Brief of Appellees AT&T Communications, Inc., MCI Telecommunications Corporation, and Sprint Communications Company LP, AT&T Communications of California, Inc., et al. v. Pacific Bell, et al., No. 96-16476 (9th Cir. filed Oct. 7, 1996);

Plaintiff MCI Telecommunications Corporation's Motion for Preliminary Injunction, MCI Telecommunications Corporation v. Southwestern Bell Telephone Co., et al., No. A96CA-651SS (W.D. Tex. filed Sept. 24, 1996);

Comments and Reply Comments of MCI Telecommunications Corporation, Amendment of the Commission's Rules to

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Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162 (filed Oct. 3 and Oct. 24, 1996).

At the January 15 meeting, the Commission staff also raised certain issues related to the above-captioned proceedings. MCI will be responding to those questions in its comments to be filed pursuant to the Public Notice in CC Docket No. 96-115 released on February 20, 1997.

Pursuant to Section 1.1206(a)(3), Note 2, of the Commission's Rules, four copies of this letter and attachments are being submitted. Please include a copy in the public record in both CC Docket No. 96-115 and WT Docket No. 96-162.

Yours truly,

Frank W. Krogh

Frank W. Krogh

cc: William A. Kehoe III
Gayle Radley Teicher
Dorothy T. Attwood
Jane Hinkley Halprin

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[Additional Counsel on Signature Page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AT&T COMMUNICATIONS OF CALIFORNIA, INC., et al.,

Plaintiffs,

v.

PACIFIC BELL, et al.,

Defendants.

CONSOLIDATED ACTION
No. C 96-1691-SBA

NOTICE AND PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: July 2, 1996
Time: 2 p.m.
Place: Courtroom 3
Honorable Saundra Brown Armstrong

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Statutes

TO DEFENDANTS Pacific Bell, Pacific Telesis Group, Pacific Bell Extras, and Pacific Bell Communications (collectively referred to as "Pacific"):

PLEASE TAKE NOTICE that at 2 p.m. on July 2, 1996, or as soon thereafter as the matter may be heard, in the United States District Court for the Northern District of California, plaintiffs AT&T Communications of California, Inc. ("AT&T"), MCI Telecommunications Corporation ("MCI"), and Sprint Communications Company L.P. ("Sprint") (collectively "plaintiffs") will, and hereby do, move the Court for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 restraining and enjoining you, your officers, agents, servants, employees and attorneys, and all those in active concert or participation with you or them from:

1. Using any Billing Information for any purpose other than the performance of billing and collection functions under the billing agreements referenced in plaintiffs' complaints;

2. Disclosing to any person or entity (including without limitation any affiliated entities or Awards Partners) any Billing Information, except to the extent necessary to perform billing and collection functions under the billing agreements referenced in plaintiffs' complaints.

This motion will be made on the ground that immediate and irreparable injury will result to plaintiffs unless the activities described above are enjoined pending trial of this action, and will be based on the Complaints in this consolidated action, this Notice and Memorandum, the Declarations of Chris T. Mannella, Judith R. Levine, Dan Arnett, and Laura Mazzarella, other papers and pleadings on file in this matter, and such other oral and documentary evidence as may come before the Court upon hearing of this matter.

I. INTRODUCTION

Plaintiffs, long distance telephone service providers, are owners of enormously valuable and proprietary billing databases containing competitive information about proven long distance users. These databases, which Pacific has access to only through contract and only for restricted purposes that do not include Pacific's marketing efforts, are being exploited by defendant Pacific Bell on a current and continuous basis. Pacific has introduced a loyalty marketing program, to compete, right now, with plaintiffs, among others, for local and long distance customers. Pacific admits that its program depends upon the ongoing use of plaintiffs' proprietary information; indeed, Pacific claims that without plaintiffs' proprietary information, Pacific could not offer a competitive loyalty marketing program. Thus, Pacific has simply misappropriated this invaluable information from plaintiffs' billing databases, developed at plaintiffs' cost in the millions of dollars, to create a loyalty program that locks in customers now, so that they will stay with Pacific later. By that time, Pacific admits that plaintiffs' proprietary information will have been disclosed to Pacific Bell Extras ("PB Extras") and Pacific Bell Communications ("PB Com"). In this way Pacific obtains and uses, for free, the proprietary information of its competitors.

Pacific's admissions confirm that plaintiffs will succeed on the merits of their claims. Pacific's admissions also confirm the current and continuous harms which plaintiffs seek to put to an immediate end. With each day that customers enroll in Pacific's program, plaintiffs lose control over a little more of their confidential information, and continue to do so as long as a customer remains in the program and is awarded points based on plaintiffs' long distance information. There is no amount of money or effort that can make plaintiffs' information confidential again. Further, Pacific is leveraging its position as a contractual agent, which provides it with access to plaintiffs' proprietary information in the first place. Pacific gains an unfair competitive advantage against plaintiffs, which Pacific claims enables it to offer a competitive loyalty program and to obtain, without paying plaintiffs for it, a list of plaintiffs' most profitable customers.

Unless and until enjoined, plaintiffs will continue to suffer irreparable harm.

II. STATEMENT OF FACTS

A. The Current, Ongoing Competition For Customers

Plaintiffs and Pacific are telecommunications services providers who are currently engaged in active competition with each other for both local and long distance customers. Levine Dec., ¶ 15. Plaintiffs provide long distance phone service, 5/7 Banco Dec., ¶ 4[1]; Declaration of Dan Arnett in Support of Plaintiffs' Application for Preliminary Injunction ("Arnett Dec."), ¶ 4, filed concurrently herewith; 5/7 Morrison Dec., ¶ 4, and intend to provide local exchange services within the next 6 to 12 months. *See* Declaration of Judith R. Levine in Support of Plaintiffs' Application for Preliminary Injunction ("Levine Dec."), ¶ 13, filed concurrently herewith. Defendant Pacific Bell provides local exchange services. 5/7 Banco Dec., ¶ 11. PB Com, the new long distance arm of the Pacific family, was created to compete directly with plaintiffs in the provision of long distance services. 5/7 Bisazza Dec., ¶ 10; Arnett Dec., ¶ 26. PB Com intends to offer long distance service within the next 6 months, Levine Dec., ¶ 12, and expects to have one million long distance customers within its first year. 5/7 Bisazza Dec., Ex. 3.

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1 In this brief, "5/7 Banco Dec." refers to the Declaration of Bruce Banco in Support of Application for Temporary Restraining Order, "5/7 Bisazza Dec." refers to the Declaration of Joseph Bisazza in Support of Application for Temporary Restraining Order, and "5/7 Morrison Dec." refers to the Declaration of Donna Morrison in Support of Application for Temporary Restraining Order, all filed with this Court on May 7, 1996. "5/13 Piccirilli Dec." refers to the Declaration of Gail Piccirilli in Support of Reply Memorandum Re: Application for Temporary Restraining Order, "5/13 Mosley Dec." refers to the Declaration of Walter Mosley in Support of Reply Memorandum Re: Application for Temporary Restraining Order and "5/13 Morrison Dec." refers to the supplemental Declaration of Donna Morrison, all filed with this Court on May 13, 1996. For the Court's convenience, copies of these declarations are attached to the Declaration of Laura Mazzarella in Support of Plaintiffs' Application for Preliminary Injunction ("Mazzarella Dec."), filed concurrently herewith.

In preparation for the imminent provision of directly competing services, plaintiffs and Pacific have *already begun* competing for long distance and local customers, and this competition is increasing rapidly. Levine Dec., ¶ 15. Pacific has already made several promotional public announcements regarding PB Com's services. Levine Dec., ¶ 12. The carriers all have ongoing loyalty marketing programs designed to retain their current customers and attract future customers. Levine Dec., ¶ 15; *see also* Declaration of Chris T. Mannella in Support of Application for Preliminary Injunction ("Mannella Dec."), ¶ ¶ 4-8, filed concurrently herewith.

Plaintiffs do not complain about this competition. They do complain, however, about Pacific's misappropriation and use of information derived from plaintiffs' proprietary billing databases to obtain an unfair competitive advantage through its loyalty program. Pacific's new loyalty program, called "Pacific Bell Awards" ("awards program"), awards customers bonus points if their combined monthly local *and long distance* charges exceed $50. 5/7 Bisazza Dec., ¶ 5, Arnett Dec., ¶ 21. But Pacific currently cannot provide long distance services and does not have its own information about customers' long distance usage. Mannella Dec., ¶ 13. There are several ways Pacific could obtain this information. For example, Pacific could invest its own resources in collecting the information directly from customers. However, since customers are unlikely to spend much effort completing surveys, answering telemarketing questions, or mailing in their old bills, the information gathered by Pacific would be neither complete nor fully accurate. So Pacific has instead chosen the least expensive and most efficient way to get long distance usage information: in order to have its "competitive" awards program, Pacific extracts, for free and in violation of its contractual duties, that essential information from plaintiffs' proprietary billing databases. 5/13 Piccirilli Dec., ¶ ¶ 10-13; Mannella Dec., ¶ 13.

Of course, the point of Pacific's loyalty program, which is administered and promoted by defendant PB Extras, is to provide incentives for customers to stay with Pacific over time in order to redeem bonus points for awards. Mannella Dec., ¶ 11, 14. This locks in customers *today* so that they will stay with Pacific Bell for local service and switch to PB Com for long distance service. Mannella Dec., ¶ 11, 14, 18. For example, it would take 17 months of monthly phone bills totaling $50 to earn 10,000 bonus points, and some awards require as many as 150,000 points. Mannella Dec., ¶ 14 and Ex. A. By then, plaintiffs and PB Com will offer directly competing services. Mannella Dec., ¶ 14.

B. Pacific's Admissions

Under the awards program, each month that a customer spends at least $50 on his or her total phone bill, the customer receives 10 bonus points for each dollar spent. 5/7 Bisazza Dec., ¶ 5 and Exs. 1, 2; Arnett Dec., ¶ 5. Pacific *is currently using*, and intends to continue using, proprietary information it receives from plaintiffs pursuant to bill rendering and collection service agreements to calculate these bonus points. Pacific admits that "bonus points are already being earned," Opp. TRO Brief at 6:11-12[2], based upon "lump sum" charges, which includes total monthly long distance charges. Opp. TRO Brief at 2:23-26, 3:1-2. The information about total monthly long distance charges is extracted from plaintiffs' proprietary databases. 5/13 Piccirilli Dec., ¶ 9, Levine Dec., ¶ 7. But no plaintiff has authorized Pacific to use any element of its proprietary information, including customer total monthly long distance charges, for the awards program. 5/7 Banco Dec., ¶ 20; Arnett Dec., ¶ 20.

By using plaintiffs' proprietary information to reward customers for both their local and long distance charges, Pacific obtains an immediate and ongoing competitive benefit. First, Pacific admits that plaintiffs' information has competitive value to Pacific: it contends that in order to compete with other customer loyalty programs Pacific must offer rewards based on total monthly long distance charges. Pacific Bell's Response to Protests Regarding Advice Letter 18145 at p.7, attached as Exhibit A to the Mazzarella Dec. But Pacific only has access to

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2 Defendants' Memorandum of Points and Authorities in Opposition to Application for Temporary Restraining Order was filed with this Court on or about May 10, 1996.

the total monthly long distance charge, an element of plaintiffs' proprietary databases, by virtue of the Billing Agreements. Instead of paying plaintiffs for the use of their information, or investing the resources necessary to gather long distance usage information directly from customers, Pacific has simply taken advantage of its contractual position as plaintiffs' billing agent to extract plaintiffs' proprietary information -- which is both accurate and complete -- for Pacific's own benefit, free of charge and all to plaintiffs' detriment, since, as Pacific claims, the very purpose of its actions is to compete with plaintiffs' loyalty programs.

Second, Pacific admits that Pacific Bell intends to disclose "lump sum" information to the Pacific defendants, including PB Com. Opp. TRO Brief at 3:15-17. By using plaintiffs' proprietary information as an element of the rewarded "lump sum," Pacific's loyalty marketing program will provide Pacific, for free, with a list of plaintiffs' most profitable long distance customers. Mannella Dec., ¶ ¶ 15-17. This is because, as designed, customers only qualify for Pacific's awards program if they spend at least $50 per month on their combined local and long distance charges, and average local charges per line are only between $20-25. Mannella Dec., ¶ 15; 5/7 Bisazza Dec., ¶ 6. Therefore, the average customer must spend at least $25 a month in long distance charges to be eligible for the awards program. It is undoubtedly not a coincidence that customers who spend $25 per month on long distance are considered heavy users of long distance and are plaintiffs' most profitable customers. Mannella Dec., ¶ 15.

C. Plaintiffs' Proprietary Information

Plaintiffs each have contracts with Pacific Bell for the provision of bill rendering and collection services ("Billing Agreements"). 5/7 Banco Dec., ¶ 14; Arnett Dec., ¶ ¶ 13; 5/7 Morrison Dec., ¶ 14. Through the Billing Agreements, millions of plaintiffs' long distance customers in California, who are also customers of Pacific Bell, receive a consolidated bill for all their telecommunications charges, with the charges from each provider included in separate portions of the bill. 5/7 Banco Dec., ¶ ¶ 12-13; Arnett Dec., ¶ 13; 5/7 Morrison Dec., ¶¶ 12-13.

Plaintiffs pay Pacific Bell a substantial amount each month to perform these bill rendering and collection services.[3] 5/7 Banco Dec., ¶ 17; Arnett Dec., ¶ 16; 5/7 Morrison Dec., ¶ 17.

In order for Pacific Bell to perform its contractual services, plaintiffs electronically transmit usage and billing information for their millions of customers to Pacific Bell each processing day. 5/7 Banco Dec., ¶ 15; Arnett Dec., ¶ 15; 5/7 Morrison Dec., ¶ 15. All the files, records, and data elements plaintiffs send to Pacific Bell are coded in a proprietary format. *Id.* The information transmitted, as well as the format itself, is highly confidential. 5/7 Banco Dec., ¶ 18; Arnett Dec., ¶ 18; 5/7 Morrison Dec., ¶ 18.

The Billing Agreements forbid the use of proprietary information for any purpose other than those stated in the contract without plaintiffs' prior written authorization. 5/7 Banco Dec., ¶ 19 and Ex. 1; Arnett Dec., ¶ 19; 5/7 Morrison Dec., ¶ 19. The contract purposes are limited to billing and collection services. *Id.* The Billing Agreements also limit the disclosure of plaintiffs' proprietary information within and without Pacific Bell to those individuals who need the information in order to perform the *contractual* obligations. *Id.*

No plaintiff has authorized the use or disclosure of its proprietary information -- or any element of it -- for any purpose other than those specified in the Billing Agreements. 5/7 Banco Dec., ¶ 20; Arnett Dec., ¶ 20; 5/7 Morrison Dec., ¶ 20. Plaintiffs seek to enjoin Pacific from any further use and disclosure of their proprietary information because they cannot provide uninterrupted billing services to each and every of their millions of customers without incurring substantial costs[4]. 5/7 Bisazza Dec., ¶ 16(d).

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[3] The Billing Agreements also require Pacific Bell to purchase plaintiffs' accounts receivable -- for which plaintiffs bear all the financial risk -- in order to perform its collection services under the contracts. *See e.g.*, 5/13 Mosley Dec., ¶¶ 3-4; 5/13 Morrison Dec., ¶ 4.

[4] Plaintiff AT&T has recently taken back the billing for some of its customers. However, it has thus far taken back under twenty percent of its California customers, and millions of its customers continue to be billed through Pacific.

D. The Economic Value Of Plaintiffs' Proprietary Information

Plaintiffs have invested substantial resources in compiling and formatting the billing information transmitted to Pacific Bell pursuant to the contracts. 5/7 Banco Dec., ¶¶ 5-7; Arnett Dec., ¶¶ 5-7; 5/7 Morrison Dec., ¶ 5-7. They have devoted hundreds of millions of dollars in capturing, processing, and organizing usage and billing information on a customer account basis, and continue to spend considerable resources, in terms of both time and money, to perform these functions, all of which makes the resulting information valuable. *Id.* Their proprietary billing data is not available to the public, and plaintiffs go to great lengths to ensure the information remains confidential. 5/7 Banco Dec., ¶¶ 9-10, 18-19; Arnett Dec., ¶¶ 9-10, 18-19; 5/7 Morrison Dec., ¶¶ 9-10, 18-19 . Plaintiffs restrict the use of this information within their own organizations and by contractual agents such as Pacific Bell, and access to the information is permitted only on a need-to-know basis. *Id.*. Plaintiffs' proprietary information is extremely valuable competitive information because it represents a detailed profile of plaintiffs' long distance businesses and their markets, products, pricing, revenues, network usage, and customers. 5/7 Banco Dec., ¶¶ 7-8; Arnett Dec., ¶¶ 7-8; 5/7 Morrison Dec., ¶¶ 7-8.

One element of plaintiffs' proprietary information, which Pacific would not have access to absent the Billing Agreements, is customer total monthly long distance charges. A customer's total monthly long distance charge is itself very valuable information; it reflects that customer's long distance usage, which is the single best predictor of future usage. 5/13 Piccirilli Dec., ¶ 9; Levine Dec., ¶ 11. The heaviest users of long distance services are the most profitable customers to acquire. 5/13 Piccirilli Dec., ¶ 4; Levine Dec., ¶ 11.

In acquiring new customers themselves, plaintiffs do not have access to actual long distance spending. 5/13 Piccirilli Dec., ¶ 5; Levine Dec., ¶ 8. Plaintiffs therefore invest significant resources, in the millions of dollars, purchasing customer lists from third parties, applying sophisticated modeling criteria to select a subset of target prospects who are likely to be heavy users of long distance services, and marketing to the target list. 5/13 Piccirilli Dec., ¶¶ 5, 7; Levine Dec., ¶ 4, 8. The models accurately predict heavy users of long distance services only 60-65% of the time. 5/13 Piccirilli Dec., ¶ 6; *see also* Levine Dec., ¶ 8. If plaintiffs had access to actual long distance usage information, they could achieve a near perfect accuracy rate, and could market their services directly to the prospective customers who are in fact heavy users of long distance, thereby reducing the considerable sums plaintiffs spend on marketing to the target list. 5/13 Piccirilli Dec., ¶¶ 6-7; Levine Dec., ¶ ¶ 8, 11. By simply taking plaintiffs' information, Pacific saves all this expense and effort.

E. Pacific's Misleading and Deceptive Advertisements

Pacific has sought to induce consumers to enroll in its program through an extensive advertising and promotional campaign including television ads, direct mail, and print ads. 5/7 Bisazza Dec., ¶¶ 5, 7-8; Arnett Dec., ¶ 21. Pacific's advertisements imply that the long distance carriers endorse Pacific's "awards program" by emphasizing the applicability of the program to *all* telephone charges, including long distance. Plaintiffs are not "award partners," sponsors, or affiliated with Pacific's "awards program" in any manner. 5/7 Bisazza Dec., ¶¶ 11(a), 16(c); Arnett Dec., ¶ 27.

Pacific's advertisements also contain misleading and inconsistent "releases." *See* 5/7 Bisazza Dec., Exs. 1 & 2. As described above, Pacific has no right to use, or to advertise that it will use plaintiffs' proprietary information, including total monthly long distance charges, for its own marketing purposes. Yet, to enable it to calculate points based on long distance charges, Pacific has presented customers with a purported "release" of plaintiffs' proprietary data. 5/7 Bisazza Dec., ¶¶ 11-12; Arnett Dec., ¶¶ 26-28. The "release," coupled with the fact that the advertisements specifically state that awards are based on total charges, including long distance charges, falsely suggest that a customer may authorize Pacific Bell to disclose plaintiffs' proprietary information. *Id.* Customers have no right to authorize Pacific Bell to release plaintiffs' information. 5/7 Bisazza Dec., ¶ 11(b); Arnett Dec., ¶ 27.

III. ARGUMENT

A. The Legal Standard

The Court may issue a preliminary injunction when the moving party demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable harm or (2) the existence of serious questions going to the merits and the balance of hardships tips sharply in its favor and a fair chance of success on the merits. *Senate of State of California v. Mosbacher*, 968 F.2d 974, 977 (9th Cir. 1992); *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987). "These formulations are not different tests but represent two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases." *Big Country Foods, Inc. v. Board of Educ. of the Anchorage School District*, 868 F.2d 1085, 1088 (9th Cir. 1989).

Under the traditional test for whether a preliminary injunction should issue, the moving party must show: "(1) a fair chance of success on the merits; (2) the possibility of irreparable injury; (3) a balance of hardships in its favor; and (4) the public interest favors granting the motion. *Stanley v. University of Southern California*, 13 F.3d 1313, 1319 (9th Cir. 1994).

Plaintiffs meet the requirements of all these tests. This Court should grant plaintiffs preliminary injunctive relief.

B. Plaintiffs' Irreparable Harm

1. The Immediate and Irreparable Harm From Pacific's Admitted Unauthorized Use of Plaintiffs' Proprietary Information

Plaintiffs have already been harmed by Pacific's unauthorized use and disclosure of their proprietary information, and that harm increases daily. As discussed below, with each day that plaintiffs' customers enroll in Pacific's awards program, Pacific further wrongfully appropriates plaintiffs' information about these customers for its own purposes and benefit. In doing so, Pacific deprives plaintiffs of control over valuable corporate assets and destroys the value of those assets to plaintiffs. This harm is continuous and irreversible: Pacific must be immediately enjoined from its continuing use of plaintiffs' proprietary information. *See MAI Systems Corp. v. Peak Computer, Inc.*, 1992 WL 159803, *17 (C.D. Cal. 1992) *aff'd in part*, 991 F.2d 511 (9th Cir. 1993), *appeal dismissed* 114 S. Ct. 671 (1994).

a) Wrongful solicitation of customers

As an initial matter, Pacific is currently using plaintiffs' trade secrets (see Section III.C.2., below) to *solicit* customers. The loyalty program is, of course, designed to encourage loyalty to *Pacific*. The program lines up and locks in customers *now* -- customers who will remain with Pacific when competition in the local exchange market begins and will switch to Pacific for long distance when PB Com is ready to provide that service. Section II.B.; Mannella Dec., ¶¶ 11, 14. Pacific's very solicitation creates irreparable harm. *MAI Systems Corp. v. Peak Computer, Inc.*, 1992 WL 159803, *17 (C.D. Cal. 1992), *aff'd*, 991 F.2d 511, 523 (9th Cir. 1993) ("As each day passes, MAI continues to be irreparably injured by Defendants' continuous use of MAI's trade secrets to expand their business and solicit MAI customers"); *American Credit Indemnity Co v. Sacks*, 213 Cal. App. 3d 622, 637 (1989) (money damages inadequate because defendant was soliciting plaintiff's customers).

Indeed, a closer look at the awards program reveals that Pacific's unauthorized use and disclosure of plaintiffs' information wrongfully diverts plaintiffs' customers to Pacific for long distance service, and unfairly impedes plaintiffs' ability to compete in the local exchange market. What Pacific is doing is indistinguishable from the situation of former employees who use confidential information obtained in the course of employment with their former employers, in violation of a confidentiality or non-compete agreement, to compete against them. Here, a contractual agent, Pacific, is using confidential information obtained in the course of the provision of services, in violation of the contract itself, to compete against plaintiffs in both the local and long distance markets. The harm from this conduct is continuous and irreversible. *See e.g., MAI Systems*, 1992 WL 159803 at *17; *California Intelligence Bureau v.*

Cunningham, 83 Cal.App.2d 197, 203 (1948); *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1334 (9th Cir. 1980).

Further, the awards program only rewards customers who spend at least $50 a month on their combined local and long distance bill, yet the average monthly charge for local services is just $20-25 per line. Section II.B. Surely it is not purely by coincidence that the awards program targets and rewards only those customers who spend at least $25 a month on long distance -- plaintiffs' most profitable customers and the heaviest users of long distance services. *See* Section II.B. Few, if any, customers would qualify for the awards program if Pacific only rewarded usage of services it provides.

Even if Pacific does nothing else with plaintiffs' proprietary databases than extract the total monthly long distance charges as part of the "lump sum" to determine which customers qualify for the awards program, it will have gained extremely valuable information.[5] Pacific will have a list of who the most profitable long distance customers are among all plaintiffs' customers. Section II.B.; Mannella Dec., ¶¶ 15-16. Thus, by essentially stealing plaintiffs' information, Pacific will not incur the significant costs associated with targeting and marketing to customers who may be heavy users of long distance. Section II.D. The benefit to Pacific is two-fold. First, Pacific has immediate access to the list of the best long distance customers, and that list is growing each day as plaintiffs' customers enroll in the awards program. Second, Pacific saves costs plaintiffs must incur to target customers (Section II.D.),

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[5] In addition to the ongoing harms occurring from Pacific's admitted conduct, Pacific threatens plaintiffs with further harm. The releases Pacific requires customers to sign to participate in the program are broad and wide-ranging. *See* 5/7 Bisazza Dec., Exs. 1 & 2. While Pacific professes that it is only using "lump sum" information, which includes one element of plaintiffs' proprietary information for the awards program, the releases purport to permit Pacific Bell to share *all* aspects of plaintiffs' proprietary information with PB Extras, which may then share such information with any Pacific affiliate (including PB Com) or Award Partner. 5/7 Bisazza Dec., ¶ 10; Arnett Dec., ¶¶ 28-29.

which gives Pacific an advantageous cost position relative to plaintiffs. If not enjoined, Pacific will use or continue to use this cost savings for pricing or promotional strategies to compete unfairly with plaintiffs for long distance customers. Viewed in the competitive context, in which the parties compete for a finite number of customers, Pacific's benefit is achieved directly at plaintiffs' expense.

b) Plaintiffs' loss of control over their valuable assets

Pacific states that it is using plaintiffs' proprietary information, specifically, total monthly long distance charges, to offer a loyalty marketing program and to reward customers for staying with Pacific. Yet the billing information it is using is both proprietary, Section II.C., and an important corporate asset in the form of valuable competitive information. Section II.D. Pacific's disclosure and use of plaintiffs' proprietary information creates irreversible harm, because once disclosed or used, its competitive value evaporates. "Once information loses its confidentiality, there is no amount of money or effort that will make that information confidential again." *Peripheral Devices Corp., II. v. Ververs*, 1995 U.S. Dist. LEXIS 11389, *27 (N.D. Ill. 1995). The loss of plaintiffs' investment is itself irreparable harm. *See, e.g., Imi-Tech Corp. v. Gagliani*, 691 F. Supp. 214, 230 (S.D. Cal. 1986) (granting preliminary injunction to prevent former employee from disclosing or using plaintiff's trade secrets; "irreparable injury is . . . shown by the evidence of plaintiff's time and money in the development of the trade secrets . . . since harm to plaintiff's competitive position lacks any adequate remedy at law"); *U.S. Surgical Corp. v. Origin Medsystems, Inc.*, 27 U.S.P.Q. 2d 1526, 1531 (N.D. Cal.), *aff'd*, 16 F.3d 420 (Fed. Cir. 1993) ("Plaintiff has invested significant time and money developing its trade secret, and defendant has already begun to divert customers from plaintiff with its product derived from stolen proprietary information").

By its actions, Pacific has also deprived plaintiffs of their exclusive right to control their own proprietary information. Plaintiffs have devoted substantial resources, in the millions of dollars, to compile and format usage and billing information on a customer account basis, which results in the proprietary information Pacific receives under the Billing Agreements. Section II.D. When someone has invested considerable time, effort, and expense to create something, much of the resulting economic value of the investment lies in the right to exclusively control that investment. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-77 (1977) (news broadcaster liable for damages to performer for depriving performer of economic value of performance); *White v. Samsung Electronics America*, 971 F.2d 1395, 1399 (9th Cir. 1992), *cert. denied*, 508 US 951 (1993) (the law protects a celebrity's sole right to exploit value of being a celebrity); *see also Processed Plastic Co. v. Warner Communications, Inc.*, 675 F.2d 852, 858 (7th Cir. 1982); *Power Test Petroleum Distributors v. Calcu Gas*, 754 F.2d 91 (2d Cir. 1985). By simply taking plaintiffs' information, Pacific has deprived plaintiffs of deciding whether, and under what terms and conditions, they would sell their proprietary information -- or any element of it -- to Pacific for Pacific's own use. That loss of control in and of itself constitutes irreparable harm. *See MAI Systems*, 1992 WL 159803 at *17; *U.S. Surgical Corp.*, 27 U.S.P.Q. 2d at 1531; *Apple Computer, Inc. v. Formula Int'l, Inc.*, 725 F.2d 521, 526 (9th Cir. 1984); *Trans Pacific Ins. Co. v. Trans-Pacific Ins. Co.*, 739 F. Supp. 240, 247 (E.D. Pa. 1990).

Moreover, Pacific gains an immediate benefit, free of charge, from its conduct: it takes plaintiffs' proprietary information, which it would not have *but for* the Billing Agreements, and uses it as the basis for its loyalty marketing program. Unquestionably, plaintiffs' information is valuable to Pacific because it believes it could not compete effectively without offering awards for the entire phone bill. Section II.B. Through its misappropriation, Pacific has unjustly enriched itself at plaintiffs' expense and must be stopped. *Imi-Tech Corp.*, 691 F. Supp. at 230 (without an injunction, defendants would be improperly permitted "to reap the benefits of using the trade secrets"); *see also Richardson v. Suzuki Motor Co., Ltd.*, 868 F.2d 1226 (Fed. Cir.

1989) *cert. denied*, 493 US 853 (1989) (applying California law) ("a misappropriator of trade secrets has no authorization or right to continue to reap the benefits of its wrongful acts").

2. The Immediate and Irreparable Injury From Pacific's False Advertising

Pacific's false and misleading advertising campaign implementing its awards program also causes immediate and irreparable injury to plaintiffs. Where a defendant makes such a false statement, such as Pacific's implied endorsement of Pacific's awards program by plaintiffs, irreparable injury is *presumed*. *U-haul Int'l, Inc. v. Jartran, Inc.*, 522 F. Supp. 1238, 1247 (D. Ariz. 1981), *aff'd*, 681 F.2d 1159 (9th Cir. 1982). "Irreparable injury for the purpose of injunctive relief would be present for the very reason that in an open market it is impossible to measure the exact amount of the competitor's damages." *Id.* (*quoting Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 192 (2d Cir. 1980)); *see also Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 210 (9th Cir. 1989). Pacific has engaged in false advertising, as described more fully below in Section III.C.4., plaintiffs, therefore, are entitled to a preliminary injunction. *Valu Engineering, Inc. v. Nolu Plastics, Inc.*, 732 F. Supp. 1024, 1025-26 (N.D. Cal. 1990).[6]

Notwithstanding the presumption of harm, irreparable harm to plaintiffs' reputations and goodwill *is* immediate. Plaintiffs' customers are signing up for the program now, based on an advertising campaign that misleads them to believe they can earn points based on long distance usage simply by signing a "release." When plaintiffs' customers find out that they cannot earn such points, because the current program violates the law, they will attribute Pacific's unlawful and deceptive practices to plaintiffs. Plaintiffs' reputations and goodwill will be irreversibly tarnished. *Apple Computer*, 725 F.2d at 526; *Trans Pacific*, 739 F. Supp. at 247.

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6 *See also Apple Computer*, 725 F.2d at 526 (trademark case); *LeSportsac, Inc. v. Kmart Corp.*, 754 F.2d 71, 79 (2d Cir. 1985) (trade dress case); *Trans Pacific*, 739 F. Supp. at 247; *McNeilab, Inc. v. American Home Prods. Corp.*, 501 F. Supp. 517, 540 (S.D.N.Y. 1980).

Pacific's conduct must be enjoined, as there is no adequate monetary remedy that could fully compensate plaintiffs for the injury that is occurring.

C. Plaintiffs Will Prevail On the Merits

1. Pacific Bell Has Already Breached The Billing Agreements

Plaintiffs provide Pacific Bell with proprietary information about *plaintiffs'* customers' long distance usage, including total monthly long distance charges, so that Pacific Bell can perform its contractual bill rendering and collection functions, and for no other reason. Section II.C. The Billing Agreements prohibit Pacific Bell from using plaintiffs' proprietary billing information for any purpose other than those specified in the contracts. *Id.* The contracts do not provide for Pacific's use of plaintiffs' data for Pacific's own marketing efforts or competitive strategy, or for disclosure within the Pacific family at large, and no plaintiff has consented to such use or disclosure. *Id.*

Pacific does not dispute this. *See* Opp. TRO Brief. Indeed, Pacific *admits that it is already using plaintiffs' proprietary information* -- total long distance monthly charges -- to calculate points for the awards program. Section II.B. As soon as customers sign up for the program (and they already have, since Pacific admits the program has begun), Pacific uses plaintiffs' proprietary information to give the customers credit for their long distance usage. Section II.B. Thus, it is undisputed that Pacific has breached the Billing Agreements, for its awards program is simply not a billing or collections service.[7] Moreover, this breach is ongoing. As each new customer signs up, more of plaintiffs' proprietary information is disclosed, and continues to be disclosed each and every month that customer remains in the awards program.

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[7] Conspicuously absent from Pacific's opposition to the TRO was any assurance that it would not use or disclose other elements of plaintiffs' proprietary compilation, beyond the monthly long distance usage information. If Pacific had no such intentions, it would just say so.

Pacific has argued that the addition of *other* service charges to plaintiffs' total monthly long distance charges to get to a "lump sum" somehow transforms plaintiffs' proprietary information into Pacific's own unrestricted information. *See* Opp. TRO Brief. But the intermingling of non-proprietary information with plaintiffs' proprietary information does not give Pacific any possessory interest in plaintiffs' information, nor does it render plaintiffs' information non-confidential. *Peripheral Devices Corp., II,* 1995 U.S. Dist. LEXIS 11389 at *26-27 (where defendant intermingled misappropriated confidential information with non-confidential information on database, entire database was confidential and use of database was preliminarily enjoined).

Nor can customers release plaintiffs' interest in plaintiffs' proprietary billing databases. In the format in which Pacific receives customer long distance information, including total monthly long distance charges, the information is proprietary to plaintiffs. Section II.C. Only plaintiffs can authorize its use or disclosure for purposes other than those set forth in the Billing Agreements, and they have not done so. Pacific agreed to this requirement by entering into the Billing Agreements. Thus, the customer is not authorized to "release" any aspect of the information which plaintiffs have compiled, formatted, and transmitted to Pacific Bell for purposes of providing the customer with a consolidated bill. Section II.C.[8]

Pacific cannot avoid the necessary and inescapable conclusion: because it is using the total monthly long distance charges obtained from plaintiffs to calculate awards, and not for billing, Pacific is engaged in an ongoing breach of its contracts. In view of Pacific's past and

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[8] Pacific, however, is free to gather customer billing information and total monthly long distance charges without misappropriating plaintiffs' proprietary information. For example, Pacific could conduct customer surveys requesting this information, or could ask customers to send in their actual, printed bills. The Billing Agreements do not preclude Pacific from investing its own resources to "independently develop[], produce[], or generate[]" information about customers' long distance usage. *See e.g.*, 5/7 Banco Dec., Ex. 1, ¶ 4(D). That is what Pacific should be required to do.